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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4643 OF 2007

M/s.Cipla Ltd. ... Petitioners

V/s.

Anant Ganpat Patil & Ors. ... Respondents

Mr.C.U. Singh with P.D. Patel, Sanjay Udeshi and Mahesh Londhe for PetitionerS
Mr.V.P. Vaidya for Respondent Nos.1 and 2
Mr.S.M. Shettigar for Respondent No.3

CORAM: **SMT.NISHITA MHATRE, J.**

JUDGMENT RESERVED ON: **OCTOBER 10, 2007**
JUDGMENT PRONOUNCED ON: **NOVEMBER 2, 2007**

JUDGEMENT:

. Rule. By consent of the parties, Rule made returnable forthwith and heard finally.

2. This petition challenges the order of the Industrial Court which has held that the petitioners have indulged in an unfair labour practice under Item 9 of Schedule IV of the MRTU & PULP Act. The Industrial Court has directed the petitioners to extend the benefits of the settlement dated 14.5.2004 to the respondent workmen (for short, hereinafter referred to as "workmen") with retrospective effect and to pay simple interest @ 15% per annum on the arrears. The petitioners have also been directed to pay costs of Rs.5000/- to the workmen.

3. The issue involved in the present petition is whether an individual workman can be denied benefits available under a settlement signed between the employer and a recognised union under section 2(p) read with section 18(1) of the Industrial Disputes Act if he does not submit an undertaking/declaration to the employer as stipulated under the settlement?

FACTS:

On 14.5.2004, a settlement was arrived at between Respondent No.3 which is a recognised union under the MRTU & PULP Act and the petitioners. This settlement was signed in accordance with sections 2(p) and 18(1) of the Industrial Disputes Act and Rule 62 of the Industrial Disputes (Bombay) Rules, 1957. The settlement pertained to revision of wages and other service conditions of the workmen employed in the Patalganga factory of the petitioners. Under the settlement every worker who wished to receive the benefits available under the settlement was expected to sign a declaration in the format annexed to the settlement. This declaration was to be submitted to the Petitioners on or before 31.5.2004. The settlement also provided that in the event a workman did not submit the declaration within the stipulated time, the benefits of

the settlement would be extended to him only in respect of the prospective wages w.e.f. the 1st month following the date of submission of the declaration. The petitioner contended that 70 workmen out of the total number of 73 workmen in its Patalganga factory have submitted their declaration before 30.5.2004. Three of the workmen including Respondent Nos.1 and 2 have not submitted the declaration. Admittedly, Respondent Nos.1 and 2 are not members of Respondent No.3. In these circumstances, the benefits of the settlement were not extended to the workmen who had not submitted the declaration.

4. Complaint (ULP) No.699 of 2006 was filed by Respondent Nos.1 and 2 complaining of an unfair labour practice committed by the petitioners under Item 9 of Schedule IV of the MRTU & PULP Act. The workmen contended that the settlement dated 14.5.2004 was signed with a recognised union and was therefore, binding on every workmen whether or not that workman was a member of the recognised union. It was further pleaded that the workmen were thus entitled to the benefits of the settlement without having to sign any undertaking. Equally the responsibilities and duties cast on the workmen under the settlement would be binding on them without them having to sign the undertaking.

5. The petitioners in their reply to the complaint contended that the benefits of the settlement were available to every employee who signed the individual declaration. The petitioners contended that the condition of having to sign a declaration was stipulated in clause 14 of the settlement and, therefore, it was a part and parcel of the settlement of 14.5.2004. It was also contended that the workmen could not accept the settlement in a truncated manner and were required to accept it as a whole, including the condition of submitting a declaration.

6. Evidence of the workmen was also led in support of the complaint. The petitioners did not lead any evidence in the matter. The workmen conceded that all the other 73 workmen except themselves and one other workman had accepted the settlement and had also submitted the required declaration.

7. The Industrial Court by its impugned order has held that since the settlement was signed under section 2(p) r/w section 18(1) between the petitioners and the recognised union, it was binding on all the workmen, irrespective of whether they were members of the recognised union. Placing reliance on the judgment of a learned Single Judge of this Court in *Bennett Coleman & Co. Ltd. & Anr. v/s. Narayan Atmaram Sawant & Ors.*,

2002 II CLR 335, the Industrial Court took the view that signing of the undertaking or declaration by an individual workman was completely unnecessary since the settlement is binding on the individual workman. The Industrial Court also observed that the complaint had been filed within the period of limitation since it was a continuous cause of action as the workman had been denied revision of wages from May 2004 onwards.

SUBMISSIONS ON BEHALF OF THE PETITIONERS:

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8. The learned Counsel for the petitioner takes exception to the order of the Industrial Court on several grounds. He points out that the complaint was filed on 28.3.2006 whereas the settlement was signed on 14.5.2004. The undertaking was to be submitted by 31.5.2004. According to the learned Counsel, the complaint ought to have been filed within a period of 90 days either from the date the settlement was signed or at least from the date by which the undertakings were to be submitted. He further submits that although there was a delay of 2 years in filing the complaint, no separate application for condoning the delay was filed by the workmen. He points out that the Industrial Court has not considered the aspect of delay at all except by stating in one line that it is a continuing cause of

action and that, therefore, there was no delay in filing the complaint. The learned Counsel then submits that the Industrial Court has granted relief to the workmen without arriving at the conclusion that the petitioner had committed an unfair labour practice. He submits that the complaint has been filed in order to challenge the settlement under the guise of having it implemented. According to him, such a complaint cannot be decided by the Industrial Court under Item 9 of Schedule IV as the Industrial Court can only ascertain whether a settlement, agreement or award has been implemented. He urges that under Item 9 of Schedule IV the Industrial Court has no jurisdiction to question the clauses of the settlement or to decide that the clauses are bad or unfair. The learned Counsel then submits that the settlement must be accepted as a whole by the workmen and they cannot decide to accept only those parts of the settlement which are beneficial to them while ignoring the other clauses. He therefore urges that the order of the Industrial Court be set aside.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS:

9. The learned Counsel for the workmen submits that there is no delay in instituting the complaint as rightly found by the Industrial Court. Non-payment of wages and other benefits under a binding settlement gives rise to a continuing clause of action, submits the learned Counsel. He urges that since the settlement is

signed under section 2(p) r/w section 18(1) of the ID Act by the Petitioners with a recognised union, the benefits of the settlement must be extended to all workmen irrespective of the submission of the declarations. According to him, a settlement signed with a recognised union u/s 18(1) gives no scope for individual employees to exercise an option as to whether they would like to be covered by the settlement. A settlement signed u/s 18(1) by an employer with a recognised union according to the learned Counsel is binding on all workers, present and future. He equates a settlement signed under section 18(1) with the recognised union with a settlement signed before a Conciliation officer u/s 18(3) as the former is equally binding on all the workmen as a settlement before the Conciliation officer. He points out that in view of the judgment in the case of *Bennett Coleman & Co. Ltd. (supra),* the Industrial Court has rightly concluded that the benefits of the settlement of 14.5.2004 must be extended to all workmen without having to sign the undertaking. The learned advocate also contends that clause 14 of the settlement and the declaration sought are against public policy and, therefore, the insistence by the petitioners on an undertaking or declaration from the workmen is an unfair labour practice under Item 9 of Schedule IV. The learned advocate then submits that an individual workman has no other remedy except to file a

complaint under Item 9 of Schedule IV of the MRTU & PULP Act and contend that some of the clauses of the settlement are against public policy. He submits that it is always open for the Court to direct the parties to implement those clauses of the settlement which are not bad or against the public policy. He submits that in view of the judgment in the case of *Central Inland Water Transport Corporation Ltd. & Anr. v/s. Brojo Nath Ganguly & Anr.*, **(1986) 3 SCC 156,** the petitioner's insistence on an undertaking is uncalled for and in fact is contrary to law. He urges that clause 14 of the settlement can always be severed from the rest of the clauses of the settlement as it is in breach of public policy. He relies on the judgment of the Supreme Court in *Beed District Central Coop. bank Ltd. v/s. State of Maharasthra & Ors.*, **(2006) 8 SCC 514** and submits that the doctrine of "Blue pencil" can be applied in the present case in order to sever clause 14 of the settlement. The learned Counsel submits that the Industrial Court has, therefore, rightly declared that the petitioners have committed an unfair labour practice under Item 9 of Schedule IV and has directed them to pay the amounts under the settlement to the workmen without insisting on an undertaking from them.

CONSIDERATION:

10. Before considering the merits of the controversy it would be necessary first to decide whether the

complaint is barred by limitation. Under section 28(1) of the MRTU & PULP Act, a complaint alleging the commission of unfair labour practices may be filed within 90 days of the occurrence of the unfair labour practice. The proviso to subsection (1) of Section 28 empowers a Court to entertain a complaint even after 90 days of the occurrence of the unfair labour practice, for good and sufficient reasons. Regulation 101 of the Industrial Court Regulations, 1975 stipulates that when a complaint u/s 28(1) of the Act is filed beyond the period of 90 days from the date when the cause of action arose, a separate application for condoning the delay must be filed. In the present case, the workmen have pleaded in para 7 of the complaint that the unfair labour practice engaged in by the Petitioners are continuous in nature and therefore no separate application has been filed. Non payment of wages gives rise to a continuous cause of action as is well settled in *Warden and Co. (India) Ltd., Bombay v/s. Akhil Maharashtra Kamgar Union, Thane,* **2001 II CLR 359.** The settlement which has not been implemented qua the workmen is with respect to payscales, DA, HRA, etc. These are payments to be made in respect of each day's work and the cause of action arises when the wages are due. Therefore, the submission on behalf of the workmen that the complaint is not barred by limitation must be accepted.

11. With the question of limitation out of the way I will now advert to the merits of the case. It would be useful to reproduce a few clauses of the settlement which are relevant for deciding the controversy in the petition:

> "GENERAL CLAUSES
> ---
>
> It is the commitment by and between the parties hereto that:
>
> a. .....
>
> b. Recognising their rights and responsibilities, the company, the union and the workmen fully understand and appreciate that the company must maintain and improve its competitive status through concerted efforts aimed at improving efficiency and productivity and avoiding all wasteful practices. The union and the workmen shall render complete and wholehearted cooperation in all reasonable measures adopted for attaining these objectives. It is also agreed that should there be any reduction in the normal productivity levels due to concerted actions of go-slow or restrictive measures adopted by the workmen, the company will have the right to, deduct wages and other benefits pro-rata to the reduction in the production levels.
>
> SCOPE OF THE SETTLEMENT
>
> 1. The benefits/obligations flowing from this settlement shall apply only to the permanent workmen of the company employed at its Patalganga establishment and, as such, the provisions of this settlement shall not apply to the trainees, temporary and casual workmen of the company.
>
> .....
>
> .....

TERMS OF SETTLEMENT

12. Ex-gratia Payment in lieu of Arrears

An ex-gratia amount calculated at the rate of Rs.1,150/- per month for the period August 01, 2003 to April 2004, proportionate to attendance will be paid to each workman in lieu of all arrears arising out of this settlement.

The ex-gratia amount computed as aforesaid shall be payable only to the workmen in the employment of the company as on the date of signing of the settlement. The amount paid as ex-gratia will not be treated as wages and shall not be taken into account for calculating PF, gratuity, bonus, overtime payment etc. earned by the workman in the relevant period. The ex-gratia amount, alongwith the amount referred to in clause 4, shall be paid on or before June 30, 2004, after deducting an amount equivalent to 5% as donation to the union, i.e. Cipla Employees' Union.

14 - Individual Acceptance

Every workman covered by this settlement will be required to make an individual declaration to the effect that the terms and conditions in this settlement are acceptable to him. Such declaration shall be in the format at Annexure III and shall be submitted on or before May 31, 2004. In case a workman does not submit the declaration as aforesaid, but chooses to submit the same at a later date, the benefits of the settlement only in respect of prospective wages will become applicable to him with effect from the first of the month following the date of submission of the declaration.

12. This settlement of 14.5.2004 deals with the general demands of the workmen. As can be seen from clause (b) of the general clauses, the union and the workmen are expected to cooperate and adopt all reasonable measures for improving efficiency and productivity. The clause also empowers the petitioner

to deduct wages and other benefits pro-rata in case the normal productivity levels drop due to go-slow or such other measures adopted by the workmen. Clause (c) of the General Clauses makes it clear that the management would enforce discipline and that the union and the workmen would cooperate in maintaining discipline by adopting constitutional means for resolving their disputes. This settlement is in full and final settlement of all the demands raised by the union on behalf of the workmen in respect of the demands raised by both the union and the management. The settlement stipulates that the benefits/obligations under the settlement apply to the permanent workmen employed in the Patalganga establishment and not to other categories of workmen. Besides the increase in wages and other benefits, an ex-gratia amount is to be paid to the workmen for the period from August 1, 2003 to April 30, 2004 in lieu of arrears arising out of the settlement. This ex-gratia is dependant upon the attendance of the workmen. Clause 14 which is the bone of contention between the petitioner and the workmen stipulates that each individual workmen would have to submit a declaration to the effect that the terms and conditions of the settlement were acceptable to him. Such a declaration was to be submitted by 31.5.2004. Clause 14 also provides that in the event the declaration is not submitted on the stipulated date but some time later,

only the prospective wages would become payable to him with effect from the month following the date on which he submits the declaration. The undertaking which each workman is expected to submit under clause 14 is in the following terms:

> "I, _____, hereby state that the contents of the settlement dated _____ between Cipla Employees' Union and the Company has been read out and explained to me and fully understood by me.
>
> I do hereby agree to abide by all the terms and conditions contained in the said memorandum of settlement. I shall fulfill all the obligations cast on me in this settlement and extend my fullest cooperation
>
> In the event of my refusal of failure to fulfill any part of my obligations towards maintaining normal production, discipline and improvements in working, the Company is at liberty to withdraw the benefits arising from the said settlement."

13. Thus by this undertaking the petitioners had decided to extract a declaration that the individual workman would abide by the terms of the agreement and would fulfill the obligations cast on him in the settlement. At the same time, the workman was obliged to enable the petitioners to withdraw the benefits arising out of the settlement in case there was a failure on his part to fulfill any of the obligations towards maintaining normal production, discipline and improvements in working.

14. A reading of clause 14 does not indicate that the extension of the benefits or obligations under the settlement of 14.5.2004 is dependant on submission of the undertaking. It merely stipulates that each workman is expected to submit the undertaking. There is no indication in any of the clauses of the settlement that if the undertaking is not submitted, the workmen would not be entitled to the benefits flowing from the settlement or would not be bound by the settlement. Therefore, in my opinion, the insistence on an undertaking/declaration is uncalled for. Apart from this, para 3 of the undertaking implies that the petitioners would be at liberty to withdraw the benefits arising out of the settlement if in their opinion, the workmen do not give the normal production levels or maintain discipline. This para thus empowers the Petitioners to take a totally subjective decision. The undertaking does not provide that the company would be at liberty to withdraw the benefits arising out the settlement after giving the workmen an opportunity to be heard. Can such an undertaking therefore do away with the right of a workman to be heard before any action is taken for deducting his wages or for disciplining him? The answer is clearly in the negative. Therefore, it would not be proper for the petitioner to insist that the undertaking should be submitted in the format that

is annexed to the settlement as a condition precedent for extending the benefits. The submission of the learned Counsel for the petitioners that clause 14 has to be accepted if the benefits of the settlement are to be given, in my opinion, is not correct because the other clauses of the settlement are not dependent on clause 14.

15. Besides, this settlement has been signed with a recognised union u/s 2(p) r/w 18(1). Such a settlement would be binding on all workmen - present and future. The relevant provisions of Section 18 read as follows:

> 18(1) A settlement arrived at by agreement between the employer and workman otherwise than in the course of conciliation proceeding shall be binding on the parties to the agreement.
>
> (2) .....
>
> (3) A settlement arrived at in the course of conciliation proceedings under this Act or an arbitration award in a case where a notification has been issued under sub-section (3-A) of section 10-A or an award of a Labour Court, Tribunal or National Tribunal which has become enforceable shall be binding on -
>
> (a) all parties to be industrial dispute;
>
> (b) all other parties summoned to appear in the proceedings as parties to the dispute, unless the Board, arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, records the opinion that they were so summoned without proper cause;
>
> (c) where a party referred to in clause (a) or clause (b) is an employer, his heirs, successors

> or assigns in respect of the establishment to which the dispute relates;
>
> (d) where a party referred to in clause (a) or clause (b) is composed of workmen, all persons who were employed in the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part.

Thus, a settlement which is signed by an employer and a recognised union is binding on all the workmen irrespective of whether they are members of the recognised union. It is also binding on those persons who are employed in the establishment on the date of the dispute as well as those who are employed from any later date. Undisputedly, the present settlement of 14.5.2004 is signed between the recognised union and the petitioners. Therefore, it is binding on all the workmen whether they agree to the terms of the settlement or not. To insist on an undertaking/declaration from the workmen that the settlement is acceptable to them is otiose. The workmen are bound by the terms of the settlement whether they sign such an undertaking or not. Both the benefits arising from the settlement as well as the responsibilities cast on the individual workman under the settlement are obligatory.

16. The apprehension of the petitioners that if they extended the benefits of the settlement without asking

for an undertaking from the workman they would be committing an unfair labour practice by not implementing clause 14 can be allayed. The provisions of law itself make it clear that a settlement signed with a recognised union is binding on a workman, irrespective of his membership with such a union. When none of the clauses under the settlement stipulate that the benefits or obligations under settlement are dependant upon the workman submitting the undertaking in the format prescribed, the petitioners would not be committing a breach of the settlement if they extended the benefits and obligations under the settlement without insisting on the declaration.

17. In *Bennett Coleman & Co. Ltd.* (supra), a learned Single Judge of this Court has already dealt with the question arising in this petition. I am in respectful agreement with the view taken by the learned Judge. It has been held that such a declaration is totally redundant and irrelevant as an individual workman is bound by a settlement which is entered into between the employer and the recognised union. The learned Judge has held as follows:

> 12. In my considered opinion, therefore, the declaration as prescribed in clause 20 is totally redundant and irrelevant. It is not at all necessary for an employee or a workman to sign such declaration that he is bound by such

> Settlement. Even in the absence of such declaration he is bound by such Settlement between the employer and the recognised union whether he is a member of the recognised union or not. To insist on such a declaration that he is bound by the Settlement is to insist on a declaration that he is bound by the Industrial Disputes Act or that he is bound by the MRTU & PULP Act! I am therefore of the opinion that the main portion of the Settlement is upto clause 19. The last clause 19 stipulates the period of duration of the Settlement. That portion of the Settlement is mandatory. Clause 20 which talks of failure to sign such declaration both are irrelevant and are of no legal significance. .....
>
> ... If a Settlement is binding on every workman as a matter of law the recognised union cannot prescribe any consequence of failure to sign such declaration to deprive the workman of the benefits of such a binding Settlement on account of his failure to sign such so-called declaration that he is bound by the Settlement. ....."

The learned Judge has then summarised the legal position thus:

> 13. ... To summarise the legal position:
>
> (a) A Settlement between the employer and a Recognised Union is binding on all the workmen, whether members or not of the union, and the employer and the union, both are bound by the Settlement and are bound to give all the benefits of such Settlement to all the workmen unconditionally;
>
> (b) The Recognised Union cannot put any preconditions on the workmen to become eligible to get the benefits of the settlement, viz. membership of the union of giving of a declaration directly or indirectly making it obligatory for workmen to become its members under compulsion to get the benefits of the Settlement as has exactly happened in the present case.

(c) Such a Settlement may provide for condition of payment of union's levy or donation on some reasonable basis as laid down in the case of Balmer Lawrie (supra) and it is certainly obligatory for the workmen to pay such levy or donation to the Recognised Union to get the benefits or advantage of such Settlement. A quid-pro-quo principle to be accepted by the workmen to get the fruits of the struggle of the Union.

(d) If the workmen do not give such declaration though demanded by the employer under the Settlement neither the workmen nor the employer can be accused of violating the Settlement. The employer cannot be held guilty of unfair labour practice under Item 9 of Schedule IV of the MRTU & PULP Act at the instance of the Recognised Union if the employer applies such Settlement to such workmen who do not give the prescribed declarations as has been done in the present case.

18. The position of law therefore is that the recognised union and an employer cannot insist that an individual workman must sign a declaration before he is extended the benefits of the settlement or is bound by the obligations under the settlement. The Petitioners have thus committed an unfair labour practice by not paying wages and other benefits under the settlement.

19. In *Central Inland Water Transport Corporation Ltd. & Anr. v/s. Brojo Nath Ganguly & Anr.*, the Supreme Court has held that contracts which are unconscionable, unfair, unreasonable and opposed to public policy are void. It has been observed further that an unconscionable bargain or contract is one which

is irreconciliable with what is right or reasonable or the terms are so unfair and unreasonable that they shock the conscience of the Court. The Supreme Court has then expounded the tests of reasonableness and fairness of a clause in a contract where there is inequality of bargaining power. The Supreme Court was conscious of the fact that there must be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power and it therefore held that the Court must judge each case on its own facts and circumstances. The Supreme Court then discussed the terms "public policy" or "opposed to public policy". It observed thus:

> 92. ...From the very nature of things, the expressions "public policy", "opposed to public policy", or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well recognised head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of though - "the narrow view" school and "the broad view" school.
>
> According to the former, courts cannot create new heads of public policy whereas the latter

countenances judicial law-making in this area. The adherents of "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well-established by authorities. Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey inJanson v. Driefontein Consolidated Gol Mines Ltd.: "Public policy is alwasy an unsafe and treacherous ground for legal decision:. That was in the year 1902. Seventy-eight years earlier, Burrough, J., in Richardson v. Mellish described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you". The Master of the Rolls, Lord Denning, however, was not a man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great taming Rucephalus, he said in Enderby Town Football Club Ltd. v. Football Assn. Ltd.; "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles". Had the timorous always held the field not only the doctrine of public policy but even the Common Law or the principles of Equity would never had evolved. Sir William Holdsworth in his "History of English Law", Volume III, page 55, has said:

> In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.

It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Prctices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon

> light of the Preamble to the Constituion. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution."

Thus seeking a declaration and especially in the form that is annexed to the settlement is opposed to public policy. The workmen are required to sign away their rights which are available to them under industrial jurisprudence as well as under the principles of natural justice by agreeing to the withdrawl of benefits under the settlement at the whim of the employer. The question is can such a clause be severed from the rest of settlement in order to save the settlement by applying the doctrine of "blue pencil".

20. In para 10 of the judgment in the case of *Beed District Central Coop. bank Ltd. v/s. State of Maharasthra & Ors.* (supra), the Supreme Court has described the doctrine of "Blue pencil". It reads thus:

> 10. The "doctrine of blue pencil" was evolved by the English and American courts. In *Halsbury's Laws of England,* (4th Edn., Vol.9) p.297, para 430, it is stated;
>
> "430. Severance of illegal and void provisions. - A contract will rarely be totally illegal or void and certain parts of it may be entirely lawful in themselves. The question therefore arises whether the illegal or void parts may be separated or 'severed' from the contract and the

rest of the contract enforced without them. Nearly all the cases arise in the context of restraint of trade, but the following principles are applicable to contracts in general."

11. In P. Ramanatha Aiyar's *Advanced Law Lexicon,* 3rd Edn. 2005, Vol. 1 pp 553-54, it is stated:

"Blue pencil doctrine (test).- A judicial standard for deciding whether to invalidate the whole contract or only the offending words. Under this standard, only the offending words are invalidated if it would be possible to delete them simply by running a blue pencil through them, as opposed to changing, adding, or rearranging words. *(Black,* 7th Edn., 1999)

This doctrine holds that if courts can render an unreasonable restraint reasonable by scratching out the offensive portions of the covenant, they should do so and then enforce the remainder. Traditionally, the doctrine is applicable only if the covenant in question is applicable, so that the unreasonable portions may be separated. *E.P.I. of Cleveland, Inc. v/s. Basler.*

Blue pencil rule/test. - Legal theory that permits a judge to limit unreasonable aspects of a covenant not to compete.

Severance of contract; 'severance can be effected when the part severed can be removed by running a blue pencil through it without awarding the remaining part'. *Attwood v. Lamont. (Banking)*

A rule in contracts a court may strike parts of a covenant not to compete in order t make the covenant reasonable. *(Merriam Webster)*

Phrase referring to severance (1.v.) of contract. 'Severance can be effected when the part severed can be removed by running a blue pencil through it' without affording the remaining part. *Attwood v. Lamont. (Banking)*"

12. The matter has recently been considered by a learned Judge of this Court while exercising his jurisdiction under sub-section (6) of Section 11 of the Arbitration and Conciliation Act, 196 in *Shin Satellite Public Co. Ltd. v. Jain Studios Ltd."*

21. The Supreme Court while delivering the judgment in the case of *Oswal Agro Furane Ltd. & Anr. v/s Oswal Agro Furane Workers Union & Ors.,* **(2005) 3 SCC 224** has observed in para 15 thus:

> "15. A settlement within the meaning of Section 2(p) read with sub-section (3) of Section 18 of the Act undoubtedly binds the workmen but the question which would arise is, would it mean that thereby the provisions contained in Sections 25-N and 25-O are not required to be complied with? The answer to the said question must be rendered in the negative. A settlement can be arrived at between the employer and workmen in case of an industrial dispute. An industrial dispute may arise as regards the validity of a retrenchment or a closure or otherwise. Such a settlement, however, as regards retrenchment or closure can be arrived at provided such retrenchment or closure has been effected in accordance with law. Requirements of issuance of a notice n terms of Sections 25N and 25O, as the case may be, and/or a decision thereupon by the appropriate Government are clearly suggestive of the fact that thereby a public policy has been laid down. The State Government before granting or refusing such permission is not only required to comply with the principles of natural justice by giving an opportunity of hearing both to the employer and the workmen but also is required to assign reasons in support thereof and is also required to pass an order having regard to the several factors laid down therein. One of the factors besides others which is required to be taken into consideration by the appropriate Government before grant or refusal of such permission is the interest of the workmen. The aforementioned provisions being imperative in character would prevail over the right of the parties to arrive at a settlement. Such a settlement must conform to the statutory conditions laying down a public policy. A contract which may otherwise be valid, however, must satisfy the tests of public policy not only in terms of the aforementioned

provisions but also in terms of Section 23 of the Indian Contract Act. (emphasis supplied)"

The Supreme Court therefore held that though a settlement between the employer and the union is binding u/s 18(3) of the Industrial Disputes Act, it was imperative that it must comply and conform with the provisions of section 25O and 25N. The employer and the union could not by a settlement, contract out of the provisions of the Act. In the present case, the petitioners and the recognised union are attempting to contract out of certain provisions of labour laws by giving the petitioners an unbridled right to reduce the benefits under the settlement on a pro-rata basis without having to hold an enquiry in case it is found that a workman has given less than normal production. Apart from this, the settlement does not specify the norms of production. All these factors in my view, leave no manner of doubt that clause 14 is opposed to public policy and the union and the management cannot contract out of the provisions of law.

22. Mr.Vaidya also draws my attention to the fact that the undertaking is not in consonance with the terms of the agreement. He points out that para 3 of the undertaking entitles the company to withdraw all the benefits arising from the settlement in case of refusal or failure of the workman to fulfill his obligations

under the settlement. However, under the general clauses of the settlement, deduction of wages is permissible on a pro-rata basis when there is a fall in the production levels. He, therefore, submits that while by the undertaking the workmen would be liable to relinquish all the benefits in case of non compliance of the obligations, the settlement only permits withdrawl of benefits on a pro-rata basis. Mr.Singh, appearing for the petitioners, submits, on instructions, that the petitioners will consider the undertaking in consonance with the settlement, especially the general clauses thereof. He further states that the petitioners are prepared to extend the benefits of the settlement to the workmen and the provisions of clause 14 regarding delayed submission of the declaration will be waived. He submits that since the workmen have no quarrel with the other clauses of the settlement, as submitted by their Counsel, the petitioners would extend the benefits of the settlement to them on their signing the undertaking.

23. In my view, this show of magnanimity on the part of the petitioners is uncalled for since in any event they are bound to extend the benefits of the settlement to the workmen. The submission of the learned Counsel for the petitioners that the agreement must be accepted by the workmen as a whole including clause 14 based on

the judgements of the Supreme Court in *Herbertsons,* etc. is without merit. His submission that clause 14 of the agreement cannot be severed in view of the judgment in *Walchandnagar Industries Limited v/s. Dattusingh Lalsing Pardeshi & Ors.,* **2005(6) Bom.C.R. 733** is also contrary to the judgement of the Supreme Court in Beed District Central Cooperative Bank Ltd. (supra). The Supreme Court has detailed the doctrine of blue pencil in this judgment which permits a Judge to limit the unreasonable aspects of a covenant. It has quoted with approval the observation of the Court in *Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.*, **2006(2) SCC 628** in para 27 of that judgment as follows:

> "27. The proper test for deciding validity or otherwise of an agreement or order is 'substantial severability' and not 'textual divisibility'. It is the duty of the court to sever and separate trivial or technical parts by retaining the main or substantial part and by giving effect to the latter if it is legal, lawful and otherwise enforceable. In such cases, the court must consider the question whether the parties could have agreed on the valid terms of the agreement had they known that the other terms were invalid or unlawful. If the answer to the said question is in the affirmative, the doctrine of severability would apply and the valid terms of the agreement could be enforced, ignoring invalid terms. To hold otherwise would be
>
> > 'to expose the convenanter to the almost inevitable risk of litigation which in nine cases out of ten he is very ill-able to afford, should he venture to act upon his own opinion as to how far the restraint upon him would be held by

> the court to be reasonable, while it may give the covenantee the full benefit of unreasonable provisions if the covenanter is unable to face litigation'."

In my opinion, therefore, clause 14 besides being redundant and unnecessary is opposed to public policy and can be severed from the agreement by "running a blue pencil through it".

24. The petitioners ought to have extended the benefits of the settlement to the workmen without insisting on an undertaking/declaration on two counts: firstly because the benefits or obligations under the settlement were not conditional upon the workmen signing the undertaking and secondly, since the settlement was signed between a recognised union and the petitioners and, therefore, binding on all workmen present and future. The insistence on an undertaking/declaration by virtue of clause 14 of the settlement is opposed to public policy as by the declaration certain rights which are available to a workman can be abrogated at the whim of the employer. The petitioners have committed an unfair labour practice by not extending the settlement to the workmen. Therefore the Industrial Court has rightly held that the petitioners have committed an unfair labour practice under Item 9 of Schedule IV of the MRTU & PULP Act.

25. In the facts and circumstances of the case, therefore, the petition is liable to be dismissed and is hereby dismissed accordingly. Rule discharged. No order as to costs.